A **KESATUAN KEBANGSAAN PEKERJA-PEKERJA BANK & ORS**

v.

KETUA PENGARAH KESATUAN SEKERJA & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ALIZATUL KHAIR OSMAN J
[ORIGINATING SUMMONS NO: R4(R2)-24-51-2008]
10 OCTOBER 2013

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LABOUR LAW: *Trade union - Eligibility to membership - Whether a trade union member who has been dismissed from employment remains a member pending final decision on challenge against dismissal - Industrial Relations Act 1967, s. 20 - Trade Unions Act 1959, s. 26(1A)*

D

STATUTORY INTERPRETATION: *Aids to construction - Hansard - Recourse by court when interpreting statute - Trade Unions Act 1959, s. 26(1A)*

WORDS AND PHRASES: *Workman - Definition of - Whether a* E *workman who has been dismissed from employment remains a workman pending final decision on challenge against dismissal - Industrial Relations Act 1967, s. 20 - Trade Unions Act 1959, s. 26(1A)*

One Mr Solomon who was the General Secretary of the first F plaintiff was dismissed from employment together with nine other members of the first plaintiff by CIMB Bank Berhad for unlawful picketing. Mr Solomon and the other members concerned challenged the dismissal and a representation was made to the Industrial Court pursuant to s. 20 of the Industrial Relations Act G 1967 ('IRA'). The representation was heard by the Industrial Court, and the present originating summons was filed, pending the decision. According to the Director General of Trade Unions ('DGTU'), Mr Solomon was allowed to continue being a member of the first plaintiff and to stand for elections based on the view H that Mr Solomon remained a workman as defined under the IRA until his representation to the Industrial Court on his dismissal was finally decided. However, the Attorney General's Chambers held the opposite view in relation to s. 26(1A) of the Trade Unions Act 1959 ('TUA'). Hence, the first plaintiff applied by way I of the present originating summons, *inter alia*, for the following

declarations, *ie*: (i) that a person who was a member of the plaintiff and who had been dismissed or retrenched from employment would still be considered and deemed to be a member of the plaintiff in the event such dismissal or retrenchment was challenged in any proceedings in court or representations had been made to the Director General of Industrial Relations ('DGIR') for his reinstatement to his former employment; and (ii) that the TUA read together with the IRA did not prevent a member of the plaintiff who had been dismissed or retrenched from employment from holding office as a member of the executive of the plaintiff, in the event such dismissal, termination, discharge or retrenchment was challenged in any proceedings in court or representations had been made to the DGIR for his reinstatement to his former employment. The sole issue for determination of the court related to the interpretation of s. 26(1A) of the TUA in a situation where an employee had been dismissed by an employer within a particular industry. More specifically, the issue was whether an employee who had been dismissed by an employer within a particular industry and whose dismissal had been challenged could continue to be a member of the Trade Union in that industry.

Held (allowing first plaintiff's application with costs):

(1) Section 26(1A) of the TUA was enacted for the purpose of restricting membership of a particular union to only persons employed in that particular type of trade or occupation or industry and not to automatically strip members of their membership of the union merely due to the fact that they were terminated from their employment (notwithstanding that they were challenging their termination by seeking reinstatement under s. 20 of the IRA). To construe it as such would enlarge the powers of the DGTU to an unacceptable and arbitrary extent. Such a construction would also run counter to the express intention of the Parliament. (paras 82 & 83)

(2) The court can rely on the Hansard to assist it in the construction of a statute. The Minister's speech when tabling the Bill to amend s. 26(1A) in the Parliament in 1988 clearly disclosed the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words, which was to confine the membership of the union only to persons engaged or employed in the trade, occupation or industry in respect of

which the union was registered; *Chor Phaik Har v. Farlim Properties Sdn Bhd* (refd); *National Union of Newspaper Workers v. Ketua Pengarah Kesatuan Sekerja* (refd). (paras 83 & 89)

(3) It would be premature to decide whether a member of a union has lost his membership due to a dismissal which is being challenged and where a representation has been made under s. 20 of the IRA and the matter referred to the Industrial Court for adjudication. This was because when an employee is dismissed and the matter was referred to the Industrial Court under s. 20 of the IRA, the burden is on the employer to prove that the dismissal was done with just cause and excuse. Thus, until and unless the Industrial Court has disposed of a representation made under s. 20 for reinstatement, another court may not deem that the workman has forfeited his union membership. (para 132)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

Anthonyamah Anthony & Ors v. Socfin Co Bhd [1992] 3 CLJ 1410; [1992] 2 CLJ (Rep) 75 HC ***(dist)***

Blackburn v. Attorney-General [1971] 2 All ER 1380 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Duport Steels Ltd v. Sirs [1980] 1 WLR 142 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***

Kempas Edible Oil Sdn Bhd (Kilang Kempas Devon) v. All Malayan Estates Staff Union (Amesu) [2006] 4 ILR 2942 IC ***(dist)***

Malaysian Bar v. Dato' Kanagalingam Veluppillai [2004] 4 CLJ 194 FC ***(refd)***

National Union of Newspaper Workers v. Ketua Pengarah Kesatuan Sekerja [2000] 4 CLJ 233 FC ***(refd)***

National Union Of Teachers In Independent Schools, West Malaysia v. Han Chiang High School, Penang [1989] 1 CLJ 1091; [1989] 2 CLJ (Rep) 160 HC ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Pepper (Inspector of Taxes) v. Hart [1993] 1 All ER 42 ***(refd)***

Perusahaan Otomobil Kedua Sdn Bhd v. Ketua Pengarah Kesatuan Sekerja & Anor [2000] 5 CLJ 351 HC ***(dist)***

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

R (on the application of Quintavalle) v. Secretary of State for Health [2003] 2 All ER 113 ***(refd)***

Re Singapore Industrial Workers Union [1964] 1 LNS 178 HC ***(refd)***

Salomon v. Commissioners of Customs & Excise [1967] 2 QB 116 ***(refd)***
Seow Teck Ming & Anor v. Tan Ah Yeo & Anor [1991] 3 CLJ 2731; [1991] 4 CLJ (Rep) 576 CA ***(foll)***
Wong Pot Heng v. Zainal Abidin Putih & Anor [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312 SC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 4, 5, 7, 20, 26(2), 59
Interpretation Acts 1948 & 1967, s. 17A
Trade Unions Act 1959, ss. 2, 10(2), 12(3), 26(1A), (1B), 29(1), 66(2)

For the 1st plaintiff - Ambiga Sreenevasan; M/s Sreenevasan Young
For the 2nd plaintiff - Chandrasegaran (Pong Fook Chuah with him); M/s Prem & Chandra
For the 3rd - 11th plaintiffs - Anand Ponnudurai; M/s Bodipalar Ponnudurai De Silva
For the 1st defendant - AG's Chambers
For the 2nd - 11th defendants - M Eswary; M/s The Law Firm Of M Eswary

Reported by Amutha Suppayah

JUDGMENT

Alizatul Khair Osman J:

Introduction

[1] This is an application by way of originating summons (encl. 1) by the first plaintiff, the National Union of Bank Employees against the first respondent, the Director General of Trade Unions for, *inter alia*, the following reliefs:

(i) a declaration that a person who is a member of the plaintiff and who has been dismissed, terminated, discharged or retrenched from employment would still be considered and be deemed a member of the plaintiff in the event such dismissal, termination, retrenchment is challenged in any proceedings in court or representations have been made to the Director General of Industrial Relations for his reinstatement to his former employment;

(ii) a declaration that the Trade Unions Act 1959 read together with the Industrial Relations Act 1967 do not prevent a member of the plaintiff who has been dismissed, terminated, discharged or retrenched from employment from holding office

A as a member of the executive of the plaintiff, in the event such dismissal, termination, discharge or retrenchment is challenged in any proceedings in court or representations have been made to the Director General of Industrial Relations for his reinstatement to his former employment; and

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(iii) a declaration that Mr Sandagran Solomon Joseph Pitchay who was elected as general secretary of the plaintiff on 7 August 2005 and re-elected as general secretary on 26 July 2008 was rightly and lawfully elected as general secretary of the plaintiff.

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[2] The second to 11th defendants were added as defendants pursuant to an application to intervene and *vide* order of court dated 16 December 2008.

[3] The second to 11th defendants were members of the first D plaintiff who were at the material time employed in the industry in respect of which the first plaintiff was registered.

[4] The second to 11th plaintiffs were added as plaintiffs to this application pursuant to an application to intervene and *vide* order E of this court dated 6 January 2009 and 9 April 2009 respectively.

Background

[5] The background facts leading to this application as set out in the first plaintiff's written submissions and in the affidavit in F support of the originating summons (encl. 2) were as follows:

> Sometime towards the end of 2004, several members of the first plaintiff filed an application to the High Court for an order to direct the DGTU to conduct elections to resolve the G ongoing internal dispute and leadership crisis facing the first plaintiff. The High Court dismissed the application but on appeal, the Court of Appeal, allowed the appeal and made an order directing the DGTU to conduct elections within four months and thereupon to announce the outcome of the H elections within 24 hours upon completion of the elections. The outcome of the elections was that Mr Solomon won by a majority of votes for the post of Branch Committee member at the Penang branch level and the post of general secretary at the national level respectively.

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[6] Since 8 August 2005 therefore, Mr Solomon has been holding the position of general secretary of the first plaintiff and conducting the administration of the first plaintiff.

[7] Mr Solomon was allowed to stand for elections and to be elected as the general secretary in 2005 by the then DGTU even though he was dismissed from employment prior to that in 2004. In fact, at the material time in 2005 the then DGTU also took the position that one Encik Muhammad Fauzi bin Haji Shamsuddin who was running for the post of president was allowed to stand for elections notwithstanding the fact that he was also dismissed and/or terminated from employment at the material time and was challenging the dismissal.

[8] The details relating to Mr Solomon's dismissal and the subsequent reference to the Industrial Court were as follows:

(i) Mr Solomon, the general secretary of the first plaintiff was dismissed from employment together with nine other members of the first plaintiff by CIMB Bank Berhad on 27 April 2004 for allegedly unlawful picketing.

(ii) Mr Solomon and the other eight members concerned challenged the dismissal and a representation was made to the Industrial Court pursuant to s. 20 of the Industrial Relations Act, 1967 ('IRA'). The representation was heard by the Industrial Court, and at the time the OS was filed, was pending decision.

[9] According to the DGTU, Mr Solomon was allowed to continue being a member of the first plaintiff and to stand for elections based on the opinion of the then legal adviser (of the Ministry of Human Resources) who was of the view that Mr Solomon remained a workman as defined under the IRA until his representation to the Industrial Court on his dismissal was finally decided. (see paras. 12.2.1 - 12.2.7., encl. 12).

[10] However in 2008, following an exchange of correspondence between the DGTU's office and the first plaintiff regarding the status of Mr Solomon (as general secretary of the first plaintiff) arising from a query raised initially by the then President of the Industrial Court when Mr Solomon appeared for the first plaintiff before her, the DGTU on 1 July 2008 wrote to Mr Solomon. In

the letter dated 1 July 2008, the DGTU stated that pursuant to queries from members pertaining to the status of the general secretary of the first plaintiffs, the DGTU referred the issue to the Attorney General's Chambers, who gave the following interpretation of s. 26(1A) of the Trade Unions Act 1959 ("TUA"):

> Subseksyen 26(1A) Akta Kesatuan Sekerja (Akta 262) memperuntukkan bahawa seseorang yang "not employed or engaged" in any establishment, trade, occupation or industry in respect of which the trade union is registered" tidak boleh menjadi anggota sesebuah kesatuan sekerja. Perkataan employed and engaged ... merujuk kepada sesorang yang masih bekerja dengan majikannya dan tidak meliputi seseorang yang telah diberhentikan kerja walaupun pekerja tersebut telah pun memfailkan representasi mengenai pembuangan kerjanya.
> (see exh. OP-2 of the first respondent's affidavit in reply dated 10 October 2008).

[11] The first plaintiff viewed the interpretation as "a grave departure" from previous practice and a drastic stance taken by the first defendant as at all material times the first plaintiff had treated and deemed members who were dismissed as members so long as their dismissals were being challenged. The implication from the aforesaid interpretation, in the first plaintiff's view, was that any member of the first plaintiff who was dismissed would automatically lose his membership of the union and all benefits and rights that attach to his membership. *Vide* letter dated 9 July 2008 to the DGTU, the first plaintiff, after seeking legal advice disputed the interpretation of the Attorney General's Chambers. The DGTU in its reply dated 21 July 2008 reiterated its stand on the matter as per its earlier letter of 1 July 2008.
(see exhs. A-11 and A-22, encl. 2 respectively).

[12] Arising out of the above sequence of events, the first plaintiff filed these present proceedings.

[13] For completeness it should be mentioned that sometime in April 2008, the first plaintiff's elections at branch levels were conducted. The principal office bearers of the first plaintiff were unanimously nominated to hold on to their respective positions for the ensuing term of 2008-2011. The result was that all the principal officer bearers of the first plaintiff were retained in their positions unopposed. Thus, Mr Solomon retained his position as general secretary of the plaintiff effectively for the term April 2008 to April 2011, when elections were next due.

Issue

[14] Arising out of the above facts the sole issue for determination before the court relates to the interpretation of s. 26(1A) of the Trade Unions Act 1959 (TUA) in a situation where an employee has been dismissed by an employer within a particular industry. More specifically, the issue was whether an employee who has been dismissed by an employer within a particular industry and whose dismissal has been challenged can continue to be a member of the trade union in that industry.

[15] Section 26(1A) of the TUA reads as follows:

> No person shall join, or be a member of, or be accepted or retained as a member of any trade union **if he is not employed or engaged in any establishment, trade, occupation in respect of which the trade union is registered**. (emphasis added)

First Plaintiff's Submission

[16] It was the first plaintiff's submission that s. 26(1A) of the TUA ("s. 26(1A)") did not preclude membership of a trade union in the circumstances where an employee has been dismissed and whose dismissal has been challenged.

[17] At the start of her submission learned counsel for the appellant urged the court to disregard:

(a) paragraphs 13 to 17 of the second to 11th defendant's affidavit; and

(b) paragraphs 3 to 6 of the first defendant's affidavits,

as they do not in any way assist the court in the construction of either the TUA or the IRA nor do they have any bearing on the construction of either legislation. Further these allegations and complaints were strongly disputed and were nothing more than allegations and complaints against the general secretary to the first plaintiff.

[18] Learned counsel also reminded the court of the terms of the court's order on 16 December 2008 which allowed the intervention of the second to 11th defendants which were as follows:

> ... ADALAH DIPERINTAHKAN bahawa Pencelah-pencelah (kecuali Pencelah No. 9) diberi kebenaran untuk mencelah dalam prosiding ini dan setelah ditambahkan sebagai Defendan 2 hingga

A 11 dalam tindakan ini dengan menghadkan diri mereka kepada isu-isu, fakta-fakta dan undang-undang yang telah dibangkitkan di dalam Saman Pemula (kandungan 1) dan Afidavit Sokongan yang diikrarkan oleh Sandagran Solomon a/l Josepah Pitchay pada 8.8.2008 (Kandungan 2) sahaja DAN AKHIRNYA DIPERINTAHKAN bahawa tiada perintah terhadap kos.

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[19] Consequently the parties ought to confine themselves only to facts which have a bearing on the construction of s. 26(1A) and other relevant provisions in the TUA and the IRA.

C **[20]** The first plaintiff's contention that s. 26(1A) do not preclude members who have been dismissed and whose dismissal is being challenged from being members of a trade union is premised on the following proposition of law:

D **[21]** Firstly, on the interpretation of s. 26(1A):

(a) the interpretation of "trade union" in the TUA read together with the definition of "workman" under s. 2 of the TUA and under s. 2 of the IRA.

E **[22]** The definition of "trade union" under s. 2 of the TUA is as follows:

"trade union" or "union" means any association or combination of **workmen** or employers, being **workmen** whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or

F employers employing workmen in West Malaysia, Sabah or Sarawak as the case may be:

(a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or

G industries; ...

"Workman" is in turn defined as "...any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward *and for the purposes of any proceedings in relation to a trade dispute includes any such person who*

H *has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute*.

Under the same section of the TUA. (emphasis added)

I **[23]** The same definition of "workman" is found in s. 2 of the IRA.

(b) Rule 4.7 of the constitution of the NUBE which reads as follows:

> Any member who has been in the Union for a period of more than six months and is retrenched from his employment for taking an active part in any movement authorized by the National Executive Council or Branch Committee, or for being a Branch Officer of the Union and for doing his duty in that capacity, or for any other reason which in the opinion of the National Executive Council, be entitled to and be given such assistance, legal, financial and/or otherwise, as shall from time to time be determined by the National Executive Council, having regard to the circumstances of each individual case. In determining any such case the National Executive Council shall be guided by the principle that any member or members so discharged from his or their employment is or are entitled to the greatest assistance which it is in the power of the Union to grant, whether legal, financial, moral or otherwise with a view to his or their reinstatement or other reasonable compensation.

[24] As this rule expressly provides for the first plaintiff to render all such assistance as is necessary to any "member" who is discharged from employment with a view to his reinstatement or compensation, it therefore implicitly recognises that a person who is discharged or terminated from employment is still a member of the trade union concerned and is entitled to all such assistance as stated therein.

[25] In this regard learned counsel referred to s. 66(2) of the TUA which provides that:

> Nothing in this Act shall be deemed to authorize a trade union to act contrary to, or in excess of the powers conferred upon it by, it a rules.

[26] The rules of the trade union ie, the constitution of NUBE in this case, having "in a sense" been approved by the DGTU (as seen from ss. 10(2) and 12(3)) it would therefore lend force to the plaintiff's argument that s. 26(1A) must be construed in the manner proposed for the rules to be consistent with the TUA.

(c) The primary purpose for the enactment of s. 26(1A) of the TUA was to limit membership of a particular union to only persons in a particular trade or industry.

[27] Section 26(1A) was not enacted to preclude a member who has been dismissed (and who is challenging his dismissal) from continuing to be a member of a trade union of a particular type of trade or occupation or industry to which the said member belonged to.

[28] Learned counsel argued that s. 26(1A) was enacted to ensure that only persons employed in a particular trade or industry may be members of a union in that particular trade or industry, for example, a hotel worker can only be a member of the Hotel Workers' Union and cannot be a member of the Newspaper Union Workers' Union.

[29] This was evident from the speech of the Minister when tabling the Bill proposing the amendment to s. 26(1A) as recorded in the Hansard dated 12 October 1988 which is reproduced below:

> Pindaan yang dicadangkan di bawah Fasal 6 adalah bertujuan menjadikan seksyen 26(1A) lebih jelas dan tepat untuk memastikan bahawa seseorang pekerja tidak boleh menganggotai atau terus menjadi ahli suatu kesatuan jika ia tidak digaji dalam tred, pekerjaan atau industri yang ada kaitan dengan kesatuan itu. Peruntukan yang ada sekarang kurang jelas sama ada seseorang yang telah masuk menjadi ahli kesatuan dan kemudiannya berhenti dari digaji dalam tred, pekerjaan atau industri berkenaan boleh mengekalkan keahliannya. Walau bagaimanapun, seseorang yang dipilih oleh ahli-ahli kesatuan dan digaji untuk bekerja sepenuh masa sebagai Setiausaha, Penolong Setiausaha, Bendahari atau Penolong Bendahari Kesatuan menurut seksyen 29(1)(a) adalah dianggap sebagai digaji dalam tred, pekerjaan atau industri yang berkenaan.

[30] That this was the primary purpose for the enactment of s. 26(1A) of the TUA was reinforced by the Federal Court decision in the case of *National Union of Newspaper Workers v. Ketua Pengarah Kesatuan Sekerja* [2000] 4 CLJ 233; [2000] 3 MLJ 689. In that case employees of two companies involved in publications namely, FPSB and STPD were members of a union called NUPW. The companies subsequently decided not to recognise NUPW as both the companies were no longer involved or connected with the newspaper publishing industry. The matter was referred to the DGTU. After due investigation, the DGTU found that both companies were no longer involved in the newspaper publishing industry.

[31] As the NUPW's constitution provided for membership of the union to be strictly for employees of the newspaper publishing and subsidiary industries only the DGTU accordingly decided that employees of both FPSB and STPD cannot be accepted or continue to be members of NUPW.

[32] The Federal Court agreed with the Court of Appeal that s. 26(1A) of the TUA can be applied by the DGTU to render the entire membership of the union in FPSB and STPD not eligible and the union incompetent to represent the entire membership of the companies.

[33] Secondly, the court should adopt a purposive approach in interpreting the TUA as the TUA is a "piece of social legislation that was enacted to regulate and prescribe rules for the formation of unions and regulate the trade union movement" with the underlying objective of promoting "social harmony between employers and workers who form the trade union movement."

[34] The purposive approach would require the court to interpret the provisions of the TUA such that they are in accord with the purpose of the TUA ie, "to provide social harmony between the employers and the employees".

[35] Counsel for the first plaintiff submitted that the courts have consistently applied the purposive approach in interpreting social legislation like the TUA and the IRA.

[36] The interpretation of s. 26(1A) by the DGTU on the other hand would not promote social harmony but would instead promote "union busting".

[37] This means that employers can successfully rid themselves of union members who are vocal and regarded as 'problematic' by terminating or discharging them and thereby removing them from the union. Other employees too would be afraid to not only be active but also to join a union out of fear of reprisal. This according to counsel could not be the intention of the TUA.

[38] The first plaintiff relied on s. 17A of the Interpretation Acts, 1948 and 1967 and the following cases in support of their proposition:

(a) *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 6 MLJ 97;

A (b) *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97;

(c) *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 All ER 113;

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(d) *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345; and

(e) *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369.

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[39] Thirdly, it was the first plaintiff's submission that in the case of a dismissal referred to the Industrial Court under s. 20 of the IRA, the burden of proving that an employee is dismissed with just cause is on the employers. If an employer fails to prove that D the dismissal was justified, the employee was deemed to have been dismissed without just cause or excuse. Thus until and unless the Industrial Court has disposed of a representation under s. 20 of the IRA for reinstatement, another court may not deem that the workman has forfeited his union membership. Citing the case of E *National Union Of Teachers In Independent Schools, West Malaysia v. Han Chiang High School, Penang* [1989] 1 CLJ 1091; [1989] 2 CLJ (Rep) 160; [1989] 2 MLJ 114, as authority for this proposition, learned counsel argued that it would be premature in the present case for this court to decide whether a member of a union (Mr F Solomon) has lost his membership due to a dismissal as his dismissal has been challenged by way of a representation under s. 20 (of the IRA) and the matter referred to the Industrial Court for adjudication. In the present case Mr Solomon is seeking reinstatement to his former employment with CIMB.

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[40] Finally, learned counsel for the plaintiff, Dato' Ambiga Sreenevasan ("Dato' Ambiga") informed the court that the MTUC at its second general council meeting on 3 August 2008 "unanimously opposed the stand and interpretation of s. 26(1A) H of the Trade Unions Act 1959 as interpreted by the Attorney General's Chambers and being adopted by the DGTU."

The Defendants' Submission

The First Defendant's Submission

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[41] Learned Senior Federal Counsel on behalf of the first defendant explained that apart from the query by the then President of the Industrial Court, numerous complaints were

received by the DGTU regarding the status of officers of trade unions, who, despite being no longer in the employment of any establishment, trade, occupation or industry in respect of which the relevant unions were registered continued to remain in the post of secretary-general of related trade unions.

[42] More specifically the Attorney-General Chamber's opinion was sought following events leading to the re-election of Mr Solomon as the secretary general. According to learned Senior Federal Counsel, in 2005 prior to the re-election of Mr Solomon, the Attorney-General's Chambers' legal opinion was not obtained specifically on the issue as to whether a member who was dismissed was competent to stand for elections and hold office in the plaintiff's unions.
(see para. 4.3, p. 3 of the first respondent's affidavits in reply dated 10 October 2008).

[43] However the opinion contained in the Attorney-General's Chambers' letter to the legal adviser dated 8 May 2008 (OP-2) was specifically in reply to the issue posed to it *viz*:

> whether a person who has been dismissed and has filed a representation under s. 20 of the Industrial Relations Act 1967 [Act 177] is competent to stand for election to be officers of the union.

[44] The first defendant's argument as regards the issue posed before the court was that, contrary to the submission of the first plaintiff, the clear words of s. 26(1A) and other related provisions of the TUA do not call for a purposive interpretation to be adopted in interpreting these provisions of the Act.

[45] Learned Senior Federal Counsel ("SFC") quoted Mohamad Azmi, SCJ's judgment in *Wong Pot Heng v. Zainal Abidin Putih & Anor* [1990] 2 CLJ 174; [1990] 1 CLJ (Rep) 312; [1991] 1 MLJ 410 in which His Lordship held:

> The purposive construction of statutes was first adopted by the House of Lords in *Fothergill v. Monarch Airlines*. It is a well established principle that the purposive approach to the interpretation of legislation only applies where any doubt arises from the terms or words employed by the legislative. But where the words are precise and unambiguous, then the literal and strict construction rule should apply.

[46] Reference was also made to the Federal Court case of *Malaysian Bar v. Dato' Kanagalingam Veluppillai* [2004] 4 CLJ 194 where the Federal Court cited with approval of Lord Diplock's observation in *Duport Steels Ltd v. Sirs* [1980] 1 WLR 142 at p. 157 that:

> where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect the plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral ...

[47] With that in mind, learned SFC proceeded to argue as follows:

> Firstly, in construing s. 26(1A) it is not necessary to refer to the definition of "workman" under s. 2 of the TUA as the meaning of "workman" in that section in particular the phrase "includes any such person who has been dismissed, discharged or retrenched..." is limited only to proceedings in relation to a "trade dispute". "Trade Dispute" in turn is defined to mean "any dispute between an employer and his workmen which is connected with the employment or non-employment of the terms of employment or the conditions of work of any such workmen." (see s. 2 of the TUA).

[48] In light of the above, the definition of "workman" in s. 2 of the TUA is clearly not applicable for the purposes of construing s. 26(1A).

[49] Instead, the words "employed or engaged" in s. 26(1A) should be given its plain and ordinary meaning. As the words are not defined in the TUA, regard must be to the New Shorter Oxford English Dictionary in order to ascertain their ordinary meaning of these words. According to the New Shorter Oxford English Dictionary 'employed' means "be engaged in; be at work" and 'engaged' means "take service with or with an employer". Based on the above definition learned SFC argued that:

> ... in the case of Mr J Solomon, since he was dismissed he is not at work and not with any employer. It logically follows that Mr J Solomon is "a person not employed or engaged in any establishment, trade, occupation or industry" class of persons envisaged under s. 26(1A).

[50] Pursuant to the above argument, she came to the following conclusion:

> Once a person is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered, the person loses his status as union member. Thus this person is not eligible to act as officers (*sic*) of the union.

[51] Learned SFC added that as the relevant part of the definition of "workman" in the TUA is limited to proceedings in relation to a trade dispute, the court cannot extend the definition to include the right or entitlement to be retained as a member of a trade union or the right or entitlement to stand for election as an officer of a trade union.

[52] The following cases were relied on by the SFC in support of her submission:

(a) *Kempas Edible Oil Sdn Bhd (Kilang Kempas Devon) v. All Malayan Estates Staff Union (Amesu)* [2006] 4 ILR 2942;

(b) *National Union of Newspaper Workers* (*supra*);

(c) *Anthonyamah Anthony & Ors v. Socfin & Co Bhd* [1992] 3 CLJ 1410; [1992] 2 CLJ (Rep) 75; and

(d) *Perusahaan Otomobil Kedua Sdn Bhd v. Ketua Pengarah Kesatuan Pekerja* [2000] 5 CLJ 351 (Perusahaan Otomobil).

The Second To 11th Defendants' Submission

[53] The stand of the second to the 11th defendants as regards the issue at hand is essentially the same as that of the first defendant.

[54] Briefly the second and 11th defendants' stand was that the direction of the DGTU which was made after seeking the advice of the Attorney-General's Chambers was the true interpretation of s. 26(1A) and was in accordance with the intention of Parliament.

[55] It was their submission that in amending s. 26(1A) Parliament had in mind that only persons employed or engaged in any establishment, trade, occupation or industry in respect of which the trade is registered shall join or be accepted or retained as a member of a trade union, the emphasis being on the words employed or engaged.

[56] Learned counsel also agreed with SFC's submission that as the wording of s. 26(1A) is clear and unambiguous "the courts are bound to give effect to that meaning irrespective of the consequences." For this proposition learned counsel relied on the case of *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713.

[57] Learned counsel then referred to the definition of "trade union" in the TUA and the IRA; the definition of "workman" and "trade dispute" in both Acts and arrived at the following proposition:

(a) Based on the definition of "trade dispute" (which is the same under the TUA and the IRA), the parties to a trade dispute are the employer and his workman. A workman is defined in the TUA as a *"person including an apprentice, employed by an employer under a contract of employment to work for hire or reward". Therefore the workman must ordinarily be in actual employment at the time of the dispute.* But when he is already dismissed or discharged or retrenched, and this has given rise to a dispute, he is still a workman for the purpose of that dispute.

(b) There is no mention of trade unions of employers or workmen in the definition of trade disputes. Hence there can be a trade dispute without unions. But when a trade union represents employers and workmen who are actually in dispute with each other, they became parties to the dispute. Consequently, when a person who was a member of a trade union is dismissed and the dismissal is challenged under s. 20 of the IRA, he is a workman for the purposes of that dispute but not for the purpose of s. 26(1A) as alleged by the plaintiffs.

This is clear from the second part of the definition in the TUA which reads, *"and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute".* (emphasis added)

It is defined as such in order to give cognisance to one of the objects of a trade union, namely para. (c)(ii) of the definition of trade union, wherein the trade union will represent the workman who was a member of the said union at the time of dismissal and whose dismissal has led to a trade dispute.

(c) As regards to the second part of the definition of "workman" in the IRA, (which is the same as that of the definition of 'workman' under the TUA) it was defined as such in order for, amongst others, to enable the trade unions to represent workmen who were its' members at the time of their dismissal and whose dismissal has led to a trade dispute; to represent the workman in a reference under s. 26 which includes collective agreements as the definition of trade dispute also includes "the terms of employment or the conditions of work of any such workmen". The reason being any dismissed, retrenched or discharged, employees, who were members of the trade union at the material time of the duration of the collective agreement would be entitled to the monetary benefits to be awarded under the collective agreement.

(d) It was therefore apparent from the wording of s. 26(1A) that in order to be a member of a trade union, or be accepted or retained as a member one should be employed or engaged in any establishment, trade or industry. The second part of the definition of 'workman' should not be read into s. 26(1A). In fact the first part of the definition of 'workman' should be read into the s. 26(1A) since member is not defined in the TUA and the section uses the word 'person'. Hence, a member who has been dismissed is no longer retained in employment, as upon dismissal his contract of employment with the employer is severed. The only right a member has upon being dismissed by his employer, is the right to be represented by the trade union in the dispute that was brought about by his dismissal. For that purpose he is a "workman" as defined under the TUA and the IRA.

(e) Rule 4.7 is a recognition of this right as it provides for representation by a trade union of a dismissed member. However it is not anywhere stated in the rules and constitution of the first plaintiff that a member who has been dismissed and who challenged his dismissal continues to be a member and to hold a position in the trade union, as alleged by the first plaintiff. In fact r. 3 of the rules and constitution of the first plaintiff expressly states as follows:

> Rule 3 - membership
>
> 1. Membership of the Union shall be open to all employees, whether permanent or temporary, who are employed in any commercial bank or its subsidiary finance company in

> Peninsula Malaysia who are above the age of sixteen, excluding those who are employed in a managerial, executive, confidential or security capacity ...

[58] Thus in *Re Singapore Industrial Workers Union* [1964] 1 LNS 178; [1964] 30 MLJ in respect of a similar provision in the union's rule the court held that:

> ... To become a member of the union, a person must in the first place be over the age of 18, and secondly he must be employed in any private undertaking or industry in Singapore.

[59] In light of the above, learned counsel reiterated that the court cannot extend the prohibitory provisions of s. 26(1A) and the present provisions of the rules and constitution of the first plaintiff which were consonant with the said section by granting the declarations sought by the first plaintiff as it will, according to counsel "amount to a contravention of s. 26(1A) of the Act".

[60] On the issue of whether the said member can continue to hold office in any trade union, counsel drew the court's attention to the amendment to s. 26(1B) of the TUA, which was introduced together with the amendment to s. 26(1A) in 1988. The said s. 26(1B) reads as follows:

> For the purposes of subsection (IA), any person who is employed by a trade union as a member of its executive under paragraph (a) of the *proviso* to s. 29(1) shall be deemed to be employed or engaged in the establishment, trade, occupation or industry concerned.

[61] It was counsel's submission that this section can never be interpreted to mean that a dismissed member can be employed by the union as he can be deemed employed by virtue of this section, for the following reasons:

(i) section 26(1B) must be read together with s. 29(1) of the TUA which stipulates thus:

> A registered trade union may, subject to subsection (2) **and of the rules of the such union**, employ and pay a secretary, treasurer and such other person as may be necessary for the purposes of such union or of any federation of trade unions to which the union belongs:

Provided that no employee of such union other than:

(a) The holder of a full-time office as secretary, assistant secretary, treasurer or assistant treasurer who is elected in accordance with the rules of such union; ...

(b) ...

shall be a member of the executive of such union. (emphasis added)

(ii) in order to be elected in accordance with the rules of such union as stated in s. 29(1)(a), and nominated, the member must be a Malaysian citizen, has attained the age of 21 years and has been working in the bank/finance company for the last one year;

(iii) a dismissed employee who does not have an employer cannot hold a position in a trade union. In other words, the employment status is a pre-condition to enable one to be a member and to hold office in a trade union; and

(iv) the deeming provision in s. 26(1B) applies to members of the trade union, namely persons employed with an employer, who are subsequently elected in accordance with the rules of the union as executive.

[62] In addition counsel referred to r. 14 of the first plaintiff's constitution and rules which provided as follows:

1(a) An Officer of the Union shall mean any member of the National Executive Council, or of any Branch Committee of the Union, but shall not include an auditor. Not less than two-thirds of the total number of the officers of the Union, other than the general secretary, the treasurer and the trustees, shall be persons actually engaged or employed in the occupation, trade or industry with which the Union is connected.

(b) No person shall be elected or act as an officer of the Union if:

(i) He is not a member of the Union; or

(ii) ...

(iii) ...

A (iv) He has not been engaged or employed for a period of a least one year in the occupation, trade or industry with which the union is connect; or ...

[63] It is an express provision of the rules that a general B secretary, the treasurer and trustees, shall be persons actually engaged or employed in the occupation.

[64] The only conclusion to be made on all the foregoing was that the intention, object and purpose is clear, namely in order to be a member and/or to hold the position of an officer of a trade C union, employment status is a pre-condition.

[65] Finally, learned counsel submitted the following reasons in support of their contention as to why a dismissed or terminated member whose dismissal or termination is challenged can never be D considered to be a member of a trade union:

(a) A claim for reinstatement should be considered as a dispute between the employer and employee and should not be connected with the status of the employee concerned as a E member of the trade union.

(b) The employees' right to join and remain as members of any trade unions depend on the existence of contracts of employment and when the contract ends, the right to remain in the trade union ends as well. As such, if such an employee F is holding any position in the union he should relinquish it.

(c) If a dismissed employee is allowed to hold any elected position in any trade union especially in respect of the main position of general secretary as in the first plaintiff, it will lead to abuse G of power wherein the trade union will be used for his own benefit as is apparent from all the complaints made by the members of the first plaintiff to DGTU.

(d) For a dispute to be referred to the Industrial Court it will take H a minimum of one to two years. For the said dispute to be concluded and for an award to be handed down by the Industrial Court it will take another two to five years. An example of this can be seen in the dispute between the general secretary of the first plaintiff with his former employer wherein I the Industrial Court was yet to hand down the decision despite the fact that he was dismissed in 2004.

(e) Furthermore, reinstatement is not the only remedy to be awarded by the Industrial Court and the unsuccessful party might take it up on judicial review to the High Court, appeal to the Court of Appeal and Federal Court accordingly which might take another five years or more.

(f) Section 26(1A) also cater for in-house unions. In this situation, it is quite unlikely for any organisation to agree to have a collective bargaining with the in-house union if the general secretary of the union is an employee who was dismissed by the said organisation.

Decision

[66] Having considered the submissions of both the plaintiff and the defendants very carefully, I was inclined to agree with the submission of the first plaintiff as regard the issue posed before the court and I accordingly granted the reliefs sought by the first plaintiff in prayer (1) and (2) of the OS, prayer (3) having been withdrawn by Dato' Ambiga at the conclusion of the first plaintiff's submission, with costs to be taxed and paid to the first plaintiff.

[67] I append below the reasons for my decision:

At the outset, I would like to state that in the course of submission before me, the Industrial Court on 27 October 2009 handed down its award. The Industrial Court found that the applicants' (ie, Mr Solomon and the other eight members concerned) dismissal was with just cause and excuse and dismissed the applicant's claim. The applicants proceeded to file, on 30 November 2009, an application for judicial review to quash the said award. Learned counsel for the first plaintiff, Dato' Ambiga informed the court that the said award would not change the first plaintiff's submission on the issue before the court.

[68] As regards Dato' Ambiga's plea that the court ignore the complaints and allegations against Mr Solomon and the first plaintiff (which were disputed), bearing in mind the terms of the court order dated 16 December 2008 and the fact that they did not assist the court in any way in determining the issue at hand, I was of the view that these complaints and allegations constitute the background facts leading to the issue before the court and in that sense they would assist the court in understanding the

A context in which this issue arose. Other than that I agreed that the issue before the court was essentially one of law, more particularly the construction of s. 26(1A) of the TUA and other related provisions of the TUA and the IRA.

B **[69]** As submitted by both learned counsels for the first plaintiff and the defendants the sole issue for the court's consideration was whether under s. 26(1A) an employee of a particular industry who has been dismissed and whose dismissal was challenged can continue or be retained as a member of the trade union in that C industry.

[70] This issue as pointed out earlier, arose out of the Attorney-General's Chambers' interpretation of that section as contained in the then DGTU's letter dated 1 July 2008 to Mr Solomon (*supra*). The gist of the Attorney-General's Chambers' interpretation was D that under s. 26(1A) of the TUA a person who was not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union was registered was precluded from being a member of the union. The words "employed or engaged" according to the Attorney-General's Chambers refers to E a person who was still in the employment of his employer and did not include a person who had been dismissed from employment notwithstanding that the dismissal was challenged under the IRA.

[71] This would mean that Mr Solomon along with nine other F members of the first plaintiff who were dismissed by their employer CIMB Bank Berhad for (allegedly) unlawful picketing but who had challenged the dismissal would automatically lose their membership and be precluded from holding any position in the union. Contending that such an interpretation would have grave G consequences not only on the first plaintiff but also other trade unions in the country, the first plaintiff strongly disputed the interpretation of s. 26(1A) given by the Attorney-General's Chambers. In their view, "union busting" or the practice of employers dismissing employees who were members of trade union H merely to stop them from being members of a union could take place arising from such an interpretation. Such a practice could cripple the trade union movement in the country.

[72] Mindful of the serious consequences that would ensue from I such an interpretation, the first plaintiff, (joined later by the second to 10th plaintiffs) having all along treated and deemed members

who were dismissed as members so long as their dismissals were being challenged, filed this application seeking the following declaration.

(1) a declaration that a person who is a member of the plaintiff and who has been dismissed, terminated, discharged or retrenched from employment would still be considered and be deemed a member of the plaintiff in the event such dismissal, termination, retrenchment is challenged in any proceedings in court or representations have been made to the Director General of Industrial Relations for his reinstatement to his former employment; and

(2) a declaration that the Trade Unions Act 1959 read together with the Industrial Relations Act 1967 do not prevent a member of the plaintiff who has been dismissed, terminated, discharged or retrenched from employment from holding office as a member of the executive of the plaintiff, in the event such dismissal, termination, discharge or retrenchment is challenged in any proceedings in court or representations have been made to the Director General of Industrial Relations for his reinstatement to his former employment.

[73] Section 26(1A) as stated earlier reads as follows:

> **No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged** in any establishment, trade, occupation or industry in respect of which the trade union is registered. (emphasis added)

[74] At first blush it would appear that s. 26(1A) prohibits any person from being a member of or be accepted or retained as a member by, any trade union unless he is employed or engaged in a trade or industry of which the trade union is registered. In other words as suggested by the defendants, and as interpreted by the Attorney-General's Chambers the purpose of s. 26(1A) was clear and unambiguous – it was to exclude any person from being a member or to continue to be a member of a trade union unless he was employed or engaged in the establishment, trade, occupation or industry of which the trade union was registered, the key words being employed or engaged. Thus a person, such as Mr Solomon, who was dismissed, was no longer employed or engaged in the trade or occupation of which the first plaintiff was

registered and he therefore could no longer continue to be a member of the union (ie, the first plaintiff) let alone continue to be an officer of the union.

[75] However upon examining s. 26(1A) I would agree with the plaintiffs that the primary purpose for the enactment of s. 26(1A) was to restrict the eligibility of membership of a trade union to persons engaged in the particular trade, occupation or industry in respect of which the trade union was registered.

[76] This can be seen from the Minister's speech when tabling the bill to amend s. 26(1A) in Parliament in 1988. In his speech, the then Minister of Labour, Mr Lee Kim Sai (as he was then known as) stated in clear and specific terms that the purpose of the amendment to s. 26(1A) was to "menjadikan s. 26(1A) lebih jelas dan tepat untuk memastikan bahawa seseorang pekerja tidak boleh menjadi ahli suatu kesatuan jika ia tidak digaji dalam tred, pekerjaan atau industri yang ada kaitan dengan kesatuan itu." (see the full excerpt of the Minister's speech as extracted from the Hansard dated 12 October 1988 at p. 13 (*supra*)).

[77] This amendment was thought to be necessary because s. 26(1A) in its original form did not state with sufficient clarity whether a member who subsequently ceased to be employed in the trade or industry of the union concerned can continue to retain his membership in the said union.

[78] Prior to the aforesaid amendment, s. 26(1A) read as follows:

> No person shall join, or be a member of, or be accepted or retained as a member by, in any trade, occupation or industry **which is not similar to the trade, occupation or industry in respect of which the trade union is registered**. (emphasis added)

[79] Subsection (1A), it must be said, was inserted in s. 26 in 1980 pursuant to the Trade Unions (Amendment) Act 1980 (Act A483).

[80] In 1989 s. 26(1A) underwent a further amendment with the passing of the Trade Unions (Amendment) Act 1989 (Act A732) which added the word "establishment" after the words "in any" in the said subsection.

[81] Thus s. 26(1A) in its present form reads: A

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered. (emphasis added) B

[82] Following from the above it was therefore clear that s. 26(1A) was enacted for the purpose of restricting membership of a particular union to only persons employed in that particular type of trade or occupation or industry and not for the purpose contended by the defendants (and as opined by the Attorney-General's Chambers) ie, to automatically strip members of their membership of the union merely due to the fact that they were terminated from their employment notwithstanding that they were challenging their termination by seeking reinstatement under s. 20 of the IRA. To construe it as such would, as submitted by learned counsel for the first plaintiff, "enlarge the powers of the DGTU to an unacceptable and arbitrary extent." C D

[83] Such a construction would also run counter to the express intention of Parliament as manifested by the Minister's speech. It has been established by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 that the court can rely on the Hansard to assist it in the construction of a statute. There the Federal Court cited with approval the landmark decision of the House of Lords in *Pepper (Inspector of Taxes) v. Hart* [1993] 1 All ER 42; [1992] 3 WLR 1032 (*Pepper v. Hart*) which decided that it was permissible in certain circumstances to refer to the reports in Hansard proceedings in either Houses of Parliament, when construing a statute. E F

[84] Following the judgment in *Pepper v. Hart* the Federal Court held that: G

> In construing a statute, a reference to Parliamentary reports of proceeding or Hansard, as an aid to statutory interpretation, should be permitted **where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity** provided that the statement reported in Hansard was made by a Minister or other promoter of a Bill. (emphasis added) H

I

[85] The Federal Court however cautioned that:

> Hansard was only an aid to interpretation and could not be determinative of the issue for that would amount to substituting the words of the Minister or promoter of the Bill for the words of the statute.

[86] In the abovesaid case the Federal Court found the ministerial statement reported in the Hansard to be of no assistance to the court at all.

[87] In the present case the court is faced with two possible construction of s. 26(1A), one as advocated by the plaintiffs and the other as contended by the defendants based on the interpretation given by the Attorney-General's Chambers.

[88] Learned counsel for the second to 11th defendants had also sought the aid of the same extract of the Hansard to support their view that in amending s. 26(1A) Parliament had intended that only persons employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered shall join or be accepted or retained as a member of a trade union, the emphasis being on the words 'employed' or "engaged".

[89] However having carefully perused the Minister's speech, I found, as stated earlier, that the Minister's speech "clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words" (to borrow Lord Browne-Wilkinson's words in *Pepper v. Hart*), which was to confine the membership of the union only to persons engaged or employed in the trade, occupation or industry in respect of which the union was registered.

[90] As pointed out by counsel for the plaintiffs that was how the Federal Court applied s. 26(1A) as seen in the case of *National Union of Newspaper Workers* (*supra*). There the Federal Court was faced with the following questions of law:

> (a) whether s. 26(1A) of the TUA can be applied by the DGTU to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership?; and

(b) whether s. 26(1A) of the TUA can be Invoked and applied to *de facto* derecognize a union and disunionize members when it is admitted that nothing has changed in respect of the establishment, trade, occupation or industry concerned?

[91] The facts giving rise to these two questions of law has been set out earlier and were briefly as follows:

The National Union of Newspaper Workers (referred to as the NUPW by the Federal Court) was a trade union which was initially recognised by FPSB and STPD (the respondent companies) as a trade union which represented their employees. Both FPSB and STPD by similar letters dated 26 December 1992 sought a ruling from the DGTU on the issue whether the NUPW can continue to represent their employees as they were no longer involved in the newspaper publishing industry. On 12 November 1991, the DGTU carried out investigations and discovered that FPSB was involved with the publication of local text books whereas STPD was in the distribution and marketing of books, magazines and encyclopedias with no involvement at all in the newspaper publishing industry.

[92] *Vide* letter dated 25 February 1992, the DGTU decided that the employees of FPSB and STPD cannot be accepted or continue to be, members of the NUPW as they were no longer categorised as employees and subsidiaries as stipulated under r. 3.1 of the NUPW's Rules and Constitution. Rule 3.1 provided that "membership" of the Union shall be open to all employees "in the newspaper publishing and subsidiary industries".

[93] One of the issues raised in the High Court was the competency of the DGTU to entertain and consequently to decide on NUPW's eligibility to represent the employees of FPSB and STPD in accordance with s. 26(1A). Hence the two questions of law posed before the Federal Court.

[94] The Federal Court answered both questions in the affirmative and held that s. 26(1A) can be applied by the DGTU to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership and it can be invoked and applied to *de facto* derecognise a union and disunionise members.

[95] This case therefore illustrates the manner in which s. 26(1A) may be invoked by the DGTU, and its application by the Federal Court was consistent with the interpretation postulated by the first plaintiffs which was to prevent a member of a different trade, industry or occupation from being a member of a union that was not meant for them.

[96] The case of *Kempas Edible* (*supra*) referred to by the defendant in their submission may be distinguished. In that case, there was a trade dispute concerning the non re-employment of one M Mukunan after the retrenchment exercise whereby he was not offered re-employment with the company despite the company having agreed that affected employees would be accorded new employment if there were vacancies in any of the company/group's operating units.

[97] It was held that M Mukunan was neither a workman nor an employee of the company when the union filed the trade dispute, nor was he employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union was registered. Though evidence was adduced that he had been faithfully paying the subscription fees to the union, the situation he was in after the dismissal rendered him ineligible to be a union member by virtue of s. 26(1A). Therefore, the union did not have the *locus standi* to espouse the claim of M Mukunan.

[98] Similarly with the case of *Anthonyamah Anthony & Ors* (*supra*) referred to by the defendants in support of their argument in their submission, the facts can also be distinguished. In this case, the contracts of employment of the applicants have been terminated since they had not reported for work for more than two days. The applicants were represented by their union (NUPW) at the trade dispute which was subsequently referred to the Industrial Court by the Minister pursuant to s. 26(2) of the IRA. NUPW had by a letter to the Industrial Court dated 4 May 1987 notified the court that it could not represent the applicants as they were not its members by virtue of a ruling made by the Registrar of Trade Unions dated 21 August 1986. The Registrar had ruled that the applicants ceased to be members of NUPW by their refusal to work on 2 October 1985 which amounted to participation in an illegal strike.

[99] The third case referred to by the defendants was *Perusahaan Otomobil Kedua Sdn Bhd* (*supra*). Again the facts were completely different from the instant case. There it was held that the DGTU in making the said decision committed an error of law and thereby exceeded his jurisdiction when he failed to take into account the relevant consideration that the second defendant being registered as an in-house union for the subsidiary company was thereby confined to serving the cause of the said employees within and not those of the applicant company and its subsidiaries.

[100] Section 26(1A) specifically prohibits the second defendant from recruiting members or retaining members if the said members were not employed or engaged in the establishment in which it was registered. Rule 3 of the second defendant clearly limited the scope of its membership to the employees in the subsidiary company. Thus, the first defendant could not extend the scope of membership of the second defendant in contravention of s. 26(1A) of the Act by amending r. 3 of the second defendant.

[101] Learned SFC and counsel for the second to 11th defendants nevertheless sought to argue that the words "**if he is not employed or engaged** ..." in s. 26(1A) presupposes that a person must be **employed** in the particular trade or industry of which the union is registered before he can be a member or be retained (as the case may be) as a member of a trade union of the particular trade or industry. (emphasis added)

[102] In their view these words "if he is not employed or engaged" in their plain and ordinary meaning means "be engaged in", "be at work" or "take service with or with an employer". Hence once a person is no longer employed or engaged in any establishment, trade, occupation or industry of which the trade union is registered the person loses his status as a union member. The meaning of these words according to counsel could not be extended to include a person who has been dismissed but whose dismissal was being challenged under s. 20 of the IRA. Nowhere, they contended does s. 26(1A) provide for such a meaning.

[103] I was not persuaded by the defendants' argument primarily because, as had been seen earlier, s. 26(1A) was not enacted for the purpose of empowering the DGTU to automatically divest a member of his membership in the union upon his dismissal or termination notwithstanding his challenge to the dismissal or

termination under s. 20 of the IRA. At the risk of repeating myself, as evident from the Minister's speech and illustrated by the case of *National Union of Newspaper Workers* s. 26(1A) was enacted for the specific purpose of limiting the eligibility of membership of a trade union to the workers of that particular trade or industry in respect of which the union is registered.

[104] The defendants cannot in my view by virtue of the words "... if he is not employed or engaged ..." construe s. 26(1A) to mean that a person who has been dismissed or terminated can no longer be retained as a member of a trade union notwithstanding the fact that his dismissal was being challenged under s. 20 of the IRA.

[105] To my mind, if parliament had intended that a workman who had been dismissed would *ipso facto* lose his status as a member of the union irrespective of whether he has filed a representation under the IRA or not, then parliament would have provided for it explicitly as was done in the case of s. 26(1A) which sought to limit eligibility for membership of a union representing workmen of a particular trade or industry to workmen actually employed in that trade or industry. This was particularly so when, as submitted by the plaintiffs, the effect of such an interpretation would have a drastic effect on the trade union movement in the country. On the defendant's contention that the likelihood of employers victimising or taking action against employees for being a member or being active in a trade union is remote as such an action would constitute an offence under s. 59 of the IRA, as pointed out by the first plaintiff's counsel, thus far no employer has been charged under this section.

[106] Secondly, the interpretation proposed by the defendants would lead to an absurdity in view of the definition of 'workman', 'trade union' and 'trade dispute' in both the TUA and the IRA.

[107] "Trade Union" under s. 2 of the TUA is defined as follows:

> "trade union" or "union" means any association or combination of workmen or employers, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak, as the case may be:
>
> (a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries;

(b) whether temporary or permanent; and

(c) having among its objects one or more of the following objects:

(i) the regulation of relations between workmen and employers for the purposes of promoting good industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;

(ia) the regulation of relations between workmen and workmen, or between employers and employers;

(ii) the representation of either workmen or employers in trade disputes;

(iiA) the conducting of, or dealing with, trade disputes and matters related thereto; or

(ii) the promotion or organization or financing of strikes or lock-outs in any trade or industry or the provision of pay or other benefits for its members during a strike or lock-out.

"Workman" under s. 2 of the TUA means any person, including an apprentice, employed by an employer under a contact of employment to work for hire or reward and *for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute*. (emphasis added)

[108] The same definition of "workman" appears in s. 2 of the IRA.

[109] "Trade dispute" in s. 2 of the TUA is defined as any dispute between an employer and his workmen which is connected with the employment or the conditions of work of any such workmen.

[110] The gist of the first plaintiff's argument (and adopted by the rest of the plaintiffs) was that based on the definition of "workman" in both the TUA and the IRA a person who had been dismissed or discharged and who is challenging his dismissal or discharge as in the case of Mr Solomon would continue to be a member of a union within the meaning assigned to it under the TUA and the IRA.

[111] Learned SFC for the first defendant and Cik Eswary for the second - 11th defendants on the other hand, argued that, the "second component" of the definition of workman ie,:

> *and for purposes of any proceedings in relation to a trade dispute include any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has lead to that dispute*. (emphasis added)

ought not to be read into s. 26(1A) as the word 'member' in that section is not defined. Both Cik Eswary and the SFC urged the court to only consider the "first component" of the definition of workman which reads:

> any person, including an apprentice, **employed by an employer under a contract of employment to work for or hire or reward**. (emphasis added)

as this was more relevant for the purpose of construing s. 26(1A). In their view the second component of the definition applies only for the purposes of any proceedings in relation to a trade dispute and therefore would not be applicable in the present context.

[112] I did not think it possible for the court to disregard the "second component" of the definition of "workman" as the "second component" (as it was referred to by Cik Eswary in her submission) constitutes an essential component of the definition of "workman" under the TUA. Cik Eswary had argued that the second component was incorporated in the definition of 'workman' in s. 2 of the TUA to give cognisance to one of the objects of a trade union which is to represent the workman who was a member at the time of dismissal and whose dismissal has led to a trade dispute. (see para. (c)(ii) of the definition of "trade union" (*supra*)). The same applies to the IRA as the definition of "workman" is identical to that in the TUA's. (see p. 23, para. (c)).

[113] Similarly with r. 4.7 of the Constitution of the NUBE which was relied on by the first plaintiff's counsel to support her argument on this issue (see pp. 11 to 12 of this judgment). The said rule was merely a recognition of the right of a dismissed workman to be represented by a trade union in the trade dispute that was brought about by his dismissal. In other words the second component of the definition of workman under the TUA is to enable a dismissed member of a trade union to be

represented in a trade dispute that was brought about by his dismissal and in the case of IRA it was also to enable the trade union to represent a workman in a reference under s. 26.

[114] It (ie, the second component of the definition) was not to enable a member who had been dismissed and whose dismissal was being challenged to continue to be a member of a union in every sense of the word including to hold a position in the union.

[115] I was unable to agree with the defendant's argument for the following reasons:

Firstly, whether or not the "second component" of the definition of workman is intended only for the limited purpose as argued by counsel ie, in the case of the TUA to enable the workman to be represented by a trade union in a trade dispute brought about by his own dismissal and in the case of the IRA, to enable a trade union to represent a workman in a reference under s. 26 of the IRA, is not entirely clear from a reading of the definition of "trade union", "workman" and "trade dispute" both in the TUA and the IRA.

[116] What is clear however is that the "second component" of the definition of "workman" in the TUA means that a workman who is dismissed and who is challenging his dismissal remains, by virtue of this definition, a member of a trade union.

[117] Rule 4.7 of the Constitution and Rules of the first plaintiff fortified by s. 66 of the TUA reflects this position. Rule 3 and the case of *Re Singapore Industrial Workers Union* (*supra*) cited by learned counsel for the second to 11th defendants to support her interpretation of s. 26(1A) relate to the minimum requirements for membership of the union and was therefore not relevant for our purposes.

[118] Thus the defendant's (and the AG's) contention that s. 26(1A) results in a dismissed workman (including one who is challenging his dismissal) losing his right to membership of a union is, as said earlier, absurd, if not untenable.

[119] Whether the aforesaid definition of a workman means that a dismissed member (who is challenging his dismissal) can continue to enjoy all his rights as a member including the right to hold a position in the union is, in the absence of a clear provision stating otherwise a matter of construction.

[120] For this purpose, as submitted by learned counsel for the first plaintiff, a purposive approach is necessary so that the construction of these provisions is consonant with the purpose of the TUA. This is also in line with the current judicial trend as held in the case of *All Malayan Estates Staff Union* (*supra*) which I will elaborate on later.

[121] The TUA was enacted to regulate the formation of trade unions and the trade unions movement in the country. This is reflected in the long title of the Act which states rather succinctly - "An Act relating to trade unions". As submitted by Dato' Ambiga, the TUA is a piece of social legislation with the underlying objective of promoting social harmony between employers and workers.

[122] The speech by the then Minister of Labour and Manpower, Dato' Richard Ho Ung Hun in Parliament when tabling the proposed amendments to the TUA on 3 April 1980 ("the said Bill") underlined this objective when he referred to trade unions in the following terms:

> Trade unionisma mempunyai potensi yang besar sebagai satu kuasa bagi sosial yang mesti di pupok dan di awasi.

[123] The Minister further stressed that:

> Satu kerajaan yang berdemokrasi yang dipilih oleh rakyat seperti kita, mestilah secara jujur mengambil langkah untuk memimpin dan mengatur pertumbuhan trade unionisma kita. (see p. 1681 of the Penyata Rasmi Parlimen Jilid II Bil. 13 bertarikh 3 April 1980).

[124] And again on 11 April 1980, when tabling the said Bill for a second and third reading at the same Parliamentary session the Minister described both the TUA and the IRA as being part of the "Undang-undang sosial Malaysia as seen below:

> Rang Undang-undang ini, bersama-sama dengan Akta Perhubungan Perusahaan (Pindaan) 1980, yang telahpun dibentangkan di Dewan ini dan akan dibaca kali keduanya kelak dalam persidangan ini, **adalah merupakan dua buah perundangan penting yang menjadi sebahagian daripada Undang-undang sosial Malaysia**. (see p. 662 of the Penyata Rasmi Parlimen Jilid II Bil. 5 bertarikh 11 April 1980). (emphasis added)

[125] The purposive approach to construction of a statute is encapsulated in s. 17A of the Interpretation Acts 1948 and 1967 which provides that:

> in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (**whether that purpose of object is expressly stated in the Act or not**) shall be preferred to a construction - that would not promote that purpose or object. (emphasis added)

[126] In the case of *All Malayan Estates Staff Union* (*supra*) the Federal Court explained at length the nature and scope of s. 17A and held, *inter alia*, as follows:

> The choice prescribed in s. 17A of "... a construction that would promote the purpose or object underlying the Act ... shall be preferred to construction that would not promote that purpose or object ..." can only arise when the meaning of a statutory provision is not plain and is ambiguous. If, therefore, the language of provision is plain and unambiguous s. 17A will have no application as the question of another meaning will not arise.
>
> Thus, it is only when a provision is capable of bearing two or more different meanings can s. 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation.

[127] In the course of their judgment the Federal Court referred to the House of Lords decision in *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 All ER 113, in particular, the judgment of Lord Bingham who expressed in clear and lucid terms the task of the court in construing a statute which is thus:

> The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsmen will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of

A Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. **The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose**. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment. (emphasis added)

[128] Thus applying s. 17A and the principles enunciated in the aforesaid judgment, the purposive approach would be preferable in construing s. 26(1A) and the other relevant provisions of the TUA, that is, the definition "workman", "trade union" and "trade dispute" as a literal interpretation of these provisions would negate the very purpose for which the TUA was enacted.

[129] In other words the interpretation advocated by the defendants would, instead of promoting social harmony, result in "union busting" (see p. 15 (*supra*) on the effects of union busting as submitted by learned counsel of the first plaintiff). Such a consequence as submitted by counsel for the plaintiffs could not have been intended by the legislature.

[130] In this regard I would also disagree with Cik Eswary's contention that s. 26(1B) (read together with s. 29(1) of the TUA) and r. 14 of the first plaintiff's Constitution and Rules clearly prohibited a dismissed member including one who is challenging his dismissal as in the case of Mr Solomon from holding the position of an officer of a trade union.

[131] Apart from the aforesaid grounds the plaintiffs also relied on the following argument to counter the defendant's contention on the effect of s. 26(1A) on a dismissed employee.

[132] The plaintiffs' argument was as follows:

It would be premature to decide whether a member of a union has lost his membership due to a dismissal which is being challenged and where a representation has been made under s. 20 and the matter referred to the Industrial Court for adjudication,

because when an employee is dismissed and the matter referred to the Industrial Court under s. 20 of the IRA, the burden is on the employer to prove that the dismissal was done with just cause and excuse. Thus until and unless the Industrial Court has disposed of a representation made under s. 20 of the IRA for reinstatement another court may not deem that the workman has forfeited his union membership. This was the *ratio decidendi* in the case of *National Union of Teachers in Independent Schools, West Malaysia*, (*supra*). In that case out of 53 teachers who were members of teachers' union 18 had resigned from the union on various dates and 35 had their services terminated by way of non-renewal of their contracts.

[133] The court was confronted with the issue of whether the Union had the necessary *locus standi* to make representation to the Industrial Court as none of the teachers were members of the Union for the reason stated above. The school and the union were at the material time locked in two disputes; one was a dispute over a collective agreement on wages and terms and conditions employed in the school, and the other was a dispute over the alleged wrongful dismissal of 35 teachers. The dispute over the collective agreement was referred to the Industrial Court by the Minister on 12 January 1987 for adjudication and the dispute over the alleged wrongful dismissal of 35 teachers was referred to the Industrial Court on 14 August 1987.

[134] In the case before the High Court, the Industrial Court was concerned only with the dispute over the collective agreement. The dispute over the alleged wrongful dismissal of 35 teachers was before another division of the court.

[135] It was held by the High Court that it was premature for an Industrial Court to decide whether the union had members or not when another Industrial Court had yet to decide on the representations made to it under s. 20 of the IRA. Eusoff Chin J (as he then was) in his judgment observed as follows:

> The Industrial Court here made a finding that although the school had not closed down, and was still in operation at the date of hearing, there was not a teacher employed by the school who was a union member because those who were union members had either resigned from the union or because their contracts were not renewed by the school. The Industrial Court held that the union

could not represent and act in a dispute on behalf of the school teachers who were not its members or no longer its members, and so the union had no locus standi before the court.

As stated earlier, the dispute concerning the alleged wrongful dismissal of the 35 teachers who were union members was referred to another division of the Industrial Court by the Minister on 14 August 1987. That division had not determined and made an award in respect of that dispute on 27 February 1988, when the question of *locus standi* of the union was heard by the Industrial Court. In holding that the union had no *locus standi* because it no longer had any members, the Industrial Court was in fact adjudicating the dispute of wrongful dismissal of the teachers who were union members, and had come to the conclusion that the teachers' services had been lawfully terminated. This Industrial Court had no jurisdiction to determine that dispute, because that very dispute had not been referred to it by the Minister, but to another division of the Industrial Court to adjudicate.

[136] In the present case Mr Solomon was seeking reinstatement to his employment with his former employers, CIMB Bank Bhd. Relying on the aforesaid decision the plaintiffs contended that until and unless final determination of the reinstatement is decided upon by the courts, it would be premature for anyone to declare that his membership as a member of the first plaintiff is automatically terminated due to his termination from employment.

[137] I agreed with the plaintiff's submission on this issue and the decision in the *National Union of Teachers in Independent Schools, West Malaysia* as it is in accord with the underlying jurisprudence of s. 20 of the IRA.

[138] Although, as mentioned earlier, the Industrial Court subsequently found that Mr Solomon's (and the other eight members') dismissal was with just cause and excuse, I also agreed with learned counsel for the first plaintiff that as Mr Solomon (and the other eight members) had filed an application for judicial review, the argument that it would be premature for the court at this juncture to hold that a dismissed workman would automatically lose his union membership notwithstanding his challenge to the dismissal, remained a valid argument.

Conclusion

[139] Thus for the reasons stated above I agreed with the plaintiffs' submission that the defendants' interpretation of s. 26(1A) on the status of a member of a trade union who had been dismissed and who had challenged his dismissal, was in the circumstances erroneous and I therefore allowed the plaintiffs' application in terms prayed for in prayers (1) and (2) of the said application.

[140] In arriving at my decision I had considered carefully the arguments canvassed by all the plaintiffs and the defendants, in particular, the reasons set out by Cik Eswary in paras. (a) to (f) of pp. 28 to 29 of this judgment on why a dismissed member whose dismissal was challenged can never be considered to be a member of a trade union. In my view, those reasons whilst arguably valid could not constitute sufficient justification for construing s. 26(1A) the way in which the defendants have construed it.

[141] It should be emphasised however that the court's decision herein was in respect of the specific issue raised before the court and in that sense was restricted to the fact situation before the court.

[142] Finally, by way of post script I would like to refer to two other issues that were raised in the course of submission before the court. There were:

(i) The ILO Convention

In the course of her submission before the court, learned counsel for the first plaintiff had alluded to the letter addressed to the Minister of Human Resources by the MTUC (see p. 180, encl. 2) that a complaint will be made to the ILO arising from the interpretation of s. 26(1A) given by the Attorney-General's Chambers. Learned counsel had submitted that such an interpretation would contravene the ILO convention namely C98, ie, the Convention on the Right to Organize and Collective Bargaining Convention 1949 which Malaysia ratified in 1961 ("the said Convention"). Both learned SFC, and counsel for the second to the 11th defendants argued that the question of the said Convention

being transgressed did not arise as the provision of the said Convention had been incorporated in the IRA notably in ss. 4, 5 and 7 and s. 59. Section 59 in particular provide the penalties that would be imposed on employers found guilty of "union busting".

Alternatively both counsel opined that even if there was a conflict the court has a duty to give effect to a national law and not international law, citing the Court of Appeal in Singapore's decision in *Seow Teck Ming & Anor v. Tan Ah Yeo & Anor* [1991] 3 CLJ 2731; [1991] 4 CLJ (Rep) 576 as authority and also Lord Denning's decision in *Blackburn v. Attorney-General* [1971] 2 All ER 1380.

Dato' Ambiga, on the other hand referred to Lord Diplock LJ's proposition in *Salomon v. Commissioners of Customs & Excise* [1967] 2 QB 116, which was as follows:

> ... there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another and others are not, the meaning which is consonant is to be preferred.

In the light of my findings above I did not think it necessary to express an opinion on this issue except to state that whilst I agree with the view expressed by the Singapore Court of Appeal in *Seow Teck Ming* (*supra*) that it is settled law that the duty of the court is to give effect to a national law and not international law if there were a real conflict between them, Lord Diplock's proposition (*supra*) to my mind is equally sound.

(ii) Position in other jurisdictions

Pursuant to the court's query as to the position in other jurisdictions on the issue before the court, learned counsel for the first plaintiff had looked at the trade union legislations in Singapore, India, UK and Australia to see whether there was an equivalent provision to our s. 26(1A).

From a perusal of the relevant legislation in Singapore (the Singaporean Trade Unions Act Chapter 333); India (the Indian Trade Unions Act 1926); the UK (Trade Union and Labour Relations (Consolidation) Act 1992 and the Trade Union Reform and Employment Rights Act 1993); and Australia (Fair Work (Registered Organizations) Act 2009), it would appear that there is no equivalent provision to our s. 26(1A) or at least there is no clear provision that provides that a member of a trade union who has been terminated or dismissed from employment would automatically lose his membership upon such termination or dismissal.